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Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique

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Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique

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I. INTRODUCTION

Since September 11, 2001, criticizing firefighters, the police, or the military seems downright unpatriotic, if not treasonous. The purpose of this Article is not to undermine the effectiveness of the U.S. military, but to point out a weakness by suggesting that increased awareness of a problem and proposed solutions is one of the first steps toward resolution. The American response to the terrorists' attacks and the media's coverage of them have heightened awareness in the United States regarding the Taliban's treatment of women in Afghanistan and how unfair that treatment was. It is time for more Ameri-

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cans to become aware of unfair treatment of women within the U.S. military, particularly regarding sexual harassment, so that some of the solutions that experts have proposed can have a chance at implementation and a chance at success, which could only strengthen the effectiveness of the military.

Because what at least one military law expert has called the “warrior mystique,”¹ an unspoken, unwritten, unofficial aspect of military culture, keeps the U.S. military from preventing, effectively litigating, and adequately compensating for sexual harassment, Congress should move the response to sexual harassment claims out of the military and into the federal administrative and judicial systems. According to that expert, who was a warrior in Vietnam and later a military lawyer and judge, the warrior mystique pervades military culture and includes, among others, the following elements: fierce competitiveness for promotions and assignments; a “good old boys” network; the notion that women do not belong in combat; an inability or unwillingness on the part of men in the military to see women in the military as equals; the idea that, because the military teaches young men to be violent to protect their country, the country should look the other way whenever those young men are violent even against women, because, after all, boys will be boys, and they are doing only what they have been taught and are expected to do; the mere WAC rule, which has manifested itself for decades as the ideas that women who join the military are certainly not ladies, are not even women worthy of respect, are most likely lesbians or whores, and are therefore fair game for, and may indeed be asking for, whatever happens to them, including sexual discrimination, sexual stereotyping, and sexual harassment; and the idea that female soldiers are not real soldiers.²

Another commentator discusses a similar theory in what she calls the “warrior culture” in the male-dominated military, which demands women’s marginalization, because accepting women as peers would be antithetical to the macho identity encouraged by the military.³ Many—if not most—professional soldiers, however, maintain that the warrior culture is necessary to develop combat soldiers. As one

1. Interviews with Jonathan P. Tomes, Partner, Tomes & Dvorak, Overland Park, Kansas (Aug. 6, 1995, July 24, 1999, & Oct. 5, 2001) [hereinafter Tomes Interviews]. The term *warrior mystique*, its definition, and its elements are used in this article with permission of Jonathan P. Tomes. Mr. Tomes is a retired lieutenant colonel in the Army Judge Advocate General’s Corps and author of the *SERVICEMEMBER’S LEGAL GUIDE* (4th ed. 2002) and numerous law review articles on military law. As an Army officer, he was an infantry platoon leader with the First Cavalry Division in Vietnam in 1969, a military prosecutor, a military defense counsel, a military judge, and the chief military law instructor at the U.S. Army Command and General Staff College at Fort Leavenworth, Kansas.

2. Tomes Interviews, *supra* note 1.

3. See LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 152, 157 (1997).

Marine infantryman stated, for example, "You can call [the warrior culture] BS but until someone comes up with a better way to get terrified 18-year-olds to stand up in front of machine guns . . . I'm sticking with it."⁴

Unfortunately, it is hard to argue with that logic, especially at a time when we need combat troops in our all-volunteer armed forces who are willing to go stand up in front of machine guns in Afghanistan, Iraq, and elsewhere to protect us from terrorism. It is also hard to imagine, however, the damage that sexual harassment does to the women in the military who also want to protect and defend us. Sexual harassment damages not only those women but also the effectiveness of the military. Even the warrior mystique cannot justify that kind of damage—for the military could be so much more effective if it could avoid the equivalent of eating its young in the way that it responds to sexual harassment.

This Article will discuss how the warrior mystique causes sexual harassment to persist in the military so that the military cannot prevent, effectively litigate, or adequately compensate for sexual harassment and how proposals for Congress to make Title VII protections available to military victims of sexual harassment could help balance some of the damaging effects of the warrior mystique.

II. THE MILITARY CANNOT PREVENT SEXUAL HARASSMENT

Just as sexual discrimination and sexual harassment continue in corporate America despite decades of lawsuits, federal and state legislation and regulation, and corporate efforts to combat sexual harassment in the workplace,⁵ female servicemembers are still subject to pervasive sexual harassment in the military. Despite increased training in the prevention of sexual harassment,⁶ "zero tolerance" policies,⁷

4. Thomas E. Ricks, *Army Faces Recruiting Obstacle: A Less-Macho Image*, WALL ST. J., Jul. 15, 1997, at A.20 (quoting John Lundy).

5. David M. Benck & Tessa Thrasher Hughes, *Investigating a Sexual Harassment Complaint: Prompt Remedial Action*, ACCA DOCKET, Mar. 2002, at 72; Andrew R. Gold & Katharine H. Parker, *Workplace Sexual Harassment Policies: Exercising Reasonable Care in Prevention*, ACCA DOCKET, Mar. 2002, at 58.

6. See *Hearing on the Statement and Status Report of the Congressional Commission on Military Training and Gender-Related Issues as Required by the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. No. 105-85) Before the Subcomm. on Military Personnel of the House Armed Services Comm.*, 106th Cong. (1999) (noting, for example, that the Army now includes prevention of sexual harassment as a part of basic combat training and equal opportunity and sexual harassment training as part of the Pre-Command Course, the Cadre Training Course, and other courses), available at <http://www.house.gov/hasc/testimony/106thcongress/99-03-17commission1.htm>.

7. An article in the *Naval Law Review* defined a "zero tolerance" sexual harassment policy as one that "means that every individual complaint of sexual harassment

and highly publicized courts-martial of those accused of sexual harassment,⁸ sexual harassment continues to be a problem for the U.S. military. For example, naval investigators reported 156 cases of inappropriate relationships between January 1986 and May 1988 at Great Lakes Naval Base near Chicago, where the Navy conducts its basic training.⁹ Among these cases were fourteen cases of sexual harassment of recruits by instructors.¹⁰ Not only do investigations and disciplinary actions¹¹ indicate that sexual harassment continues in

will be investigated and that the individuals involved in the 'unwanted' sexual attention will be brought to justice." Kristin K. Heimark, *Sexual Harassment in the United States Navy: A New Pair of Glasses*, 44 NAVAL L. REV. 223, n.9 (1997).

The Navy announced its "zero tolerance" policy in 1989 when Navy Secretary Lawrence Garret issued the following instruction: "Sexual harassment is unacceptable conduct; it undermines the integrity of the employment relationship, debilitates morale, and interferes with the work productivity of an organization. Sexual harassment will not be tolerated at any level. Substantiated acts of or conduct which results in sexual harassment shall result in corrective action." NAVY SEC'Y LAWRENCE GARRET, DEP'T OF THE NAVY, SECNAV INSTRUCTION NO. 5300.26A (1989).

Criticism of the "zero tolerance" policy focuses on the belief that the military professes zero tolerance easily but fails to enforce it:

The military professes to have "zero tolerance" of sexual harassment, with elaborate policies to define and prevent offenses. Unfortunately, the phrase "zero tolerance" has become a parody of itself, more accurately referring to things the military doesn't really care to do anything about. Instead of taking action to enforce a policy and eliminate problem behavior, which the military is historically quite effective in doing, it is much easier to just proclaim there is "zero tolerance" and move on to something else.

Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 U. FLA. L. REV. 461, 464 (1996).

8. Perhaps the most notorious trial was that of the Army Sergeant Major Gene McKinney for sexual harassment, allegedly consisting of pressuring subordinates for dates, forced kissing, and boasting of his sexual prowess to female subordinates. Sergeant Major McKinney was acquitted by general court-martial of all sexual harassment charges and convicted of one specification of obstruction of justice for attempting to coach the testimony of one of his accusers. See, e.g., Jane Gross, *Former Top Sergeant of Army Is Acquitted of All Sex Charges*, N.Y. TIMES, Mar. 14, 1998, at A1 [hereinafter Gross, *Former*]; Jane Gross, *When Character Counts*, N.Y. TIMES, Mar. 15, 1998, at A1; Stephen Komarow, *Army Sex Scandal Reaches Higher, Service's Top Enlisted Man Faces Charges*, USA TODAY, May 8, 1997, at 3A. Certainly, some irony exists in being convicted of trying to cover up crimes of which one was found not guilty.
9. *Navy Report: Sexual Harassment Not Pervasive at Coed Boot Camp*, THE ST. J.-REG., Dec. 26, 1988 (Local), at 12, as cited in Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 368 n.8 (1999). If 156 cases is not pervasive, what is?
10. *Id.*
11. See, e.g., Amanda Vogt, *Ex-Navy Instructor Admits to Sex Charges*, CHI. TRIB., Oct. 7, 1998, at 1 (reporting a Navy petty officer's sentence to a demotion, a bad-conduct discharge, and 198 days' confinement for pleading guilty to sexual harassment and fraternization with recruits); *Sailor in Sex Case Still Unhappy*, AP ONLINE, Nov. 3, 1998, at 1998 WL 21782521 (This article reported on a sexual

the military, but scholarly writings, and mainstream newspaper articles recognize the problem, as well.¹²

Sexual harassment and the methods currently used to remedy it continue to cause problems for commanders and those whom they lead. Further, the "solutions" may actually exacerbate the problems that women face in the military. Professor Diane H. Mazur, a former Air Force officer, in an article that demonstrates considerable insight into the military, has noted that potential solutions, although advanced by those who support greater military participation by women, "are more dangerous because they are superficially protective and supportive, yet unwittingly they will erode the already uncertain status of military women even further."¹³ She believes that the solutions are based on an incorrect assumption that women are incapable of resisting inappropriate sexual behavior or, in many cases, of reporting it:

The military has already taken a number of steps to prevent future instances of sexual misconduct against women recruits and, at least so far, the military's actions have been applauded. In particular, the Army has increased supervision of recruits, has moved to severely punish past offenders, and is devising new systems for reporting misconduct. Unfortunately, these actions have been myopically short-term in nature. Each carries a long-term danger for women in the military, and in the hurry "to do something," little attention has been paid to whether they are doing more harm than good.¹⁴

Professor Mazur cites training regulations prohibiting trainees from going anywhere alone as an example of a "fix" that is counter-

harassment victim's dissatisfaction with nonjudicial punishment taken against the commander of a Navy destroyer who had made suggestive comments and kissed her. The maximum punishment that he could receive—the actual punishment was not reported—was thirty days of restriction and a punitive letter of reprimand.).

12. See, e.g., SEC'Y OF DEFENSE WILLIAM S. COHEN, DEP'T OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS app. G, tbl.G-2 (1998) (detailing the high number of sexual harassment complaints filed with the Department of Defense between 1987 and 1996); MARGARET C. HARRELL & LAURA L. MILLER, NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 73-77 (1997); Tom Bowman, *Army Officers Fear Dating Ban May Hurt Bonds Within Units: Cohen Expected to OK Policy Soon; He Wants Same Code Among All Branches*, DALLAS MORNING NEWS, Jan. 3, 1999, at 9A (stating that a ban on socializing between junior officers and their sergeants would harm camaraderie and unit cohesion).

Also, a very well thought out article postulates that "more so than in other areas of the law, the legal regulation of sexual conduct has been characterized by inattention and panic, minimization and overreaction." Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 306 (1998) (illustrating the military's inattention/panic contradiction leading to the conclusion that curing the problem of sexual harassment by the resegregation of women in basic training stems from faulty logic that confuses sexual harassment with heterosexuality and mistakes power for sexual desire).

13. Mazur, *supra* note 7, at 462.

14. *Id.* at 465.

productive. She believes that a policy suggesting that women must be protected from harm by restricting their liberty is similar to the rationale behind prohibiting women in combat—no one on the battlefield can protect women from attacks by their fellow soldiers.¹⁵ Further according to Professor Mazur, prosecutions often only discipline the men, where both men and women have engaged in inappropriate, but consensual relationships. The problem with this type of prosecution is that exempting women from responsibility diminishes their service and sets a poor precedent for the future.¹⁶ But the situation may not be likely to change. For example, the Defense Advisory Committee on Women in the Services ("DACOWITS") has reported that male supervisors feared that their superiors would not support them if they tried to hold women accountable, and subordinate females feared that this situation harmed their opportunity to be treated as equals.¹⁷ Finally, new systems for reporting misconduct are unlikely to be productive, because they do not use the chain of command. Using the chain of command is ingrained in all servicemembers, but once one goes outside it to report a problem, that problem is no longer a priority for the command:

Policies that encourage women to take their complaints outside the chain of command are the worst possible way to approach the problem of sexual misconduct. If we tell the military that it is incapable of preventing sexual misconduct, it will never become capable. If we tell individual supervisors and commanders that they are incompetent to respond to women's concerns, they will remain incompetent.¹⁸

In short, the warrior mystique flourishes, and sexual harassment continues to be a major problem for the military. Further, the existing system for dealing with sexual harassment does not appear to be adequately preventing the problem. Rather, both the existing system and recent "fixes" appear to be exacerbating the problem, harming both the military and those whom the system is designed to protect from sexual harassment. Scholars have proposed a number of solutions, including: renaming and reorienting the offense of fraternization because, in its current "sexualized meaning," the rules are incoherent and place too much emphasis on the dangers of sexual conduct as opposed to overly familiar behavior and reduce or eliminate broad bans on consensual conduct outside the chain of command;¹⁹ extending Ti-

15. *Id.* at 466.

16. *Id.* at 467-69. The author does not suggest that men should not be punished as severely as has occurred or that women should be punished as severely, but that the punishment should be related to the degree of culpability that would normally result in a higher ranking male being punished more severely than a lower ranking female.

17. Rowan Scarborough, *Pentagon Finds Less Harassment; Officers Cite "Fear" of Women*, WASH. TIMES, Dec. 10, 1998, at A1.

18. Mazur, *supra* note 7, at 470.

19. See, e.g., Chamallas, *supra* note 12, at 361-63.

tle VII to uniformed personnel;²⁰ and changing the forum for the adjudication of harassment cases from the court-martial to the Equal Employment Opportunity Commission ("EEOC") and federal civil court.²¹ Despite these suggestions, the military continues to experience problems preventing sexual harassment, as well as effectively litigating it and adequately compensating it, because of the warrior mystique.

III. THE MILITARY CANNOT EFFECTIVELY LITIGATE SEXUAL HARASSMENT CASES

The military justice system, including courts-martial, was not designed to determine whether a female servicemember was the victim of sexual harassment by another servicemember.²² Further, the factfinders in this system are not particularly suited to making this type of determination, whether the factfinder is a commander who is deciding whether the allegation is substantiated so as to require disciplinary action against the offender, whether the factfinder is a convening authority deciding whether to try a case by court-martial, or whether the factfinder is a court-martial panel trying to determine beyond a reasonable doubt whether to convict an accused harasser.

Evaluation of a sexual harassment case is far more complicated than deciding, for example, whether a servicemember should be punished for absence without leave.²³ Professor Chamallas, in her article on the military's "gender panic," opines that this panic lumps both coercive and consensual sexual conduct into the same undifferentiated source—biological urges—which results in commanders treating rapists as if they have caused the same types of injuries to persons as those who have committed adultery.²⁴ Further, because most commanders are male and the senior ones are usually older males, they may have difficulty divorcing themselves from a culture that has his-

20. Yxta Maya Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN'S STUD. 279, 290-91 (1994).

21. Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335 (1999).

22. Aside from the lack of women in the military at the time that our military justice system was created, little doubt exists that it was viewed as an instrument of discipline, not a system of justice. See *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) ("A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 21-24 (1974).

23. The Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 886 (2000), criminalizes leaving one's military unit without authority.

24. Chamallas, *supra* note 12, at 320.

torically viewed sexual harassment as unimportant.²⁵ In other words, the warrior mystique makes it hard to police sexual harassment cases.

Political correctness pressures, media pressures, and the like may lead to bad decisions. Such pressures can cause the commander either to prosecute a servicemember that he or she shouldn't or, strangely enough, to prevent prosecutions that should occur. Professor Chamallas has noted the phenomenon that the excessive media coverage of the numerous military sex cases creates the impression that things have gone too far and that it is time to stop the accusations.²⁶ In addition, media saturation has generated a high degree of skepticism about the legitimacy of complaints of sexual harassment.²⁷ Finally, commanders, out of fear of the post-Tailhook bloodletting (which destroyed careers or delayed promotions), may tend to err "on the side of inquisition, persecution, and recrimination."²⁸

Further, commanders have a strong incentive not to find a sexual harassment claim to be valid. Finding that one of his or her subordinates sexually harassed another may well indicate to the commander's superiors that he or she does not have an effective program to combat sexual harassment and, worse, that he or she has no control over the servicemembers under his or her command. Further, if the press gets involved, it makes not only the immediate unit, but also higher units and the military service itself, look bad. Such problems are hardly career-enhancing, and the warrior mystique prevents proper evaluation of a potential sexual harassment case:

At each level of the chain, the superior officer has discretion concerning how to deal with the complaint. Additionally, each superior has a vested interest in what is termed in naval aviation parlance "covering your six." Each individual is held responsible for the personnel below them. Covering your six can lead to many complaints being hidden or ignored. Investigations into a complaint attract attention to the problem, and a problem looks bad for the superior responsible.²⁹

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25. Douglas R. Kay, Comment, *Running a Gauntlet of Sexual Abuse: Sexual Harassment of Female Naval Personnel in the United States Navy*, 29 CAL. W. L. REV. 307, 330 (1992) (citing Kay Krohne, *The Effect of Sexual Harassment on Female Naval Officers: A Phenomenological Study* (1991) (unpublished Ed.D. dissertation, University of San Diego)). For a discussion of the effects of the military's culture on sexual harassment and other sex crimes, see FRANCKE, *supra* note 3, at 152, 190; Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 525 (1991); Murray, *supra* note 20, at 296-97.
26. Chamallas, *supra* note 12, at 320.
27. *Id.* at 321.
28. Bruce T. Smith, *Tempting the Better Part of Valor*, 44-FEB FED LAW. 13, 13 (1977).
29. Kay, *supra* note 25, at 331 (citing DOROTHY SCHNEIDER & CARL SCHNEIDER, *SOUND OFF? AMERICAN MILITARY WOMEN SPEAK OUT* 47 (1988) ("Usually the physical assaults servicewomen told us about were reported but handled semiofficially, at as low as level as possible, by people who wished to quiet the troubled waters or swim out of them.")).

Assuming that the commander makes a proper decision to send a sexual harassment case to a court-martial,³⁰ the issue remains whether a court-martial is a proper forum for a sexual harassment case. Among the many problems with the court-martial system in general are the following: courts-martial are not sitting courts, but rather are "convened" by commanders; commanders select the court-members (jurors); commanders decide, subject to review by the military judge, many pretrial motions, such as discovery motions and motions to produce witnesses; commanders enter into plea bargains with defendants or immunize witnesses to induce them to testify, and so-called "command influence" can taint the trial. These problems may make arriving at a proper decision unlikely in a court-martial. In addition, other aspects of the military justice system, which may not lead to unfair decisions in any other case, may prevent reaching a proper decision in a sexual harassment case. These aspects include the requirement to prove guilt beyond a reasonable doubt and the nonunanimous jury verdict requirement in a court-martial.

Courts-martial are not sitting courts, but rather are *ad hoc* tribunals to which commanders may refer one or more cases for trial.³¹ The same problems with commanders investigating and disposing of sexual harassment complaints³² apply to convening authorities' decisions whether to send a sexual harassment case to trial by court-martial. First, as one military court-martial illustrated, the convening authority may not be the one who should make decisions as to whether a sexual harassment claim goes to trial. In *United States v. Kroop*,³³ the convening authority in a sexual harassment case was being investigated for sexual crimes of a similar nature to those of the accused. The military appellate court did not find these facts to disqualify the convening authority.³⁴ Would a civilian criminal justice

30. R. COURTS-MARTIAL 306(b) ("Allegations of offenses should be disposed of in a timely manner and the lowest appropriate level of disposition listed in subsection (c) of this rule.") See *supra* notes 22–26 and accompanying text for a discussion of the dispositions authorized by Rule of Courts-Martial 306(c).

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interests of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair. Factors include possible improper motives of the accuser and reluctance of the victim or others to testify. See *supra* notes 22–26 and accompanying text for discussion of Rule of Courts-Martial 306(b).

31. BISHOP, *supra* note 22, at 27 (1974). See also WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1920).

32. See *supra* notes 24–26 and accompanying text.

33. 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993).

34. *Id.* at 632.

system allow a prosecutor under investigation for a crime to make decisions about defendants charged with similar crimes? In addition, the higher ranking commander who convenes courts-martial and refers cases to them may have difficulty evaluating a sexual harassment case, may be pressured by the media or others, and may want to cover up a harassment case to avoid looking as if such problems exist in his or her command rather than referring the case to trial.³⁵

The Uniform Code of Military Justice ("UCMJ") does not, in specific terms, prohibit sexual harassment. Although the Department of Defense ("DOD") has defined sexual harassment,³⁶ convening authorities must choose among a number of potential charges, none of which may cover conduct that constitutes sexual harassment under the DOD standard. An act of sexual harassment may constitute "cruelty and maltreatment of a subordinate,"³⁷ extortion,³⁸ indecent language,³⁹

35. See *supra* notes 23–29 and accompanying text.

36. The Department of Defense definition of sexual harassment, which applies to both military members and civilian employees, is as follows:

Sexual harassment is a form of sexual discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

SEC'y OF DEFENSE, PROHIBITION OF SEXUAL HARASSMENT IN THE DEPARTMENT OF DEFENSE 1 (Aug. 22, 1994) (Memorandum to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Inspector General of the Department of Defense, Director, Administration and Management, and Directors of the Defense Agencies).

37. 10 U.S.C. § 893 (2000). This article, Article 93 of the UCMJ, will often apply to sexual harassment cases, but cases interpreting this article are ambiguous as to whether it criminalizes maltreatment of direct subordinates only or extends to any lower ranking personnel. Compare *United States v. Hullett*, 40 M.J. 189 (C.M.A. 1994) (stating that sexually oriented statements to a junior may violate Article 93) with *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (remanding the case because, even though the alleged victim was junior, the appellant had no authority over her). See also William T. Barto, *Sexual Harassment and the Uniform Code of Military Justice: A Primer for the Military Justice Practitioner*, ARMY LAW., July 1995, at 3, 4–6 (stating that voluntary acts between the victim and the accused may exonerate the accused).

38. The UCMJ defines extortion as communicating a threat with the intent to obtain anything of value. 10 U.S.C. § 927 (2000). Sexual favors qualify as something of value. *United States v. Hicks*, 24 M.J. 3, 5–6 (C.M.A. 1987).

39. 10 U.S.C. § 934 (2000). Indecent language is language that is "grossly offensive to modesty, decency, or propriety, or shocks moral sensibilities because of its vulgar, filthy, or disgusting nature, or its tendencies to incite lustful thought." MANUAL FOR COURTS-MARTIAL para. 89c (2002) [hereinafter M.C.M.].

provoking words and gestures,⁴⁰ disorderly conduct,⁴¹ and/or fraternization.⁴² If the harassment involves physical contact, it may constitute assault, assault consummated by a battery,⁴³ indecent assault, assault with the intent to commit rape or sodomy,⁴⁴ rape,⁴⁵ or sodomy,⁴⁶ as well as cruelty and maltreatment and/or fraternization. In addition, a court-martial could punish an accused under the so-called "general article" for conduct to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces⁴⁷ or as

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40. 10 U.S.C. § 917 (2000). Provoking words or gestures are those that tend to provoke breaches of the peace. M.C.M. para. 42c(1) (2002).
 41. 10 U.S.C. § 934. Disorderly conduct is conduct of a nature to affect the peace and quiet of those who may witness it and be disturbed or provoked to resentment, including conduct that endangers public morals or outrages public decency. M.C.M. para. 73c(2) (2002).
 42. 10 U.S.C. § 934. Fraternization comprises the act(s) of a commissioned or warrant officer fraternizing on terms of military equality with an enlisted person when such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality. The explanation states that factors that the court-martial should consider to determine whether the contact or association comprises an offense include whether the conduct has compromised the chain of command, resulted in an appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. M.C.M. para. 84c(1) (2002). Fraternization may also be prosecuted as a violation of Article 92, as violating a general order or regulation if the accused's service has such a regulation prohibiting fraternization. 10 U.S.C. § 892 (2000).
 43. Both of these assaults are prohibited. 10 U.S.C. § 928 (2000).
 44. 10 U.S.C. § 934. Indecent assault is one done with the intent to gratify the lust or sexual desires of the accused. See M.C.M. para. 63 (2002). Assault with the intent to commit rape or sodomy requires a specific intent to commit such crimes.
 45. 10 U.S.C. § 920 (2000). The maximum punishment for rape is death, confinement for life, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to the lowest enlisted grade. M.C.M. para. 46e (2002). Under current military law, the military recognizes that the necessary "by force and without consent" may include "constructive force," in which the victim's consent is induced by the extraordinary power that a military superior has over a subordinate. *E.g.*, *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992). See generally, *Timothy W. Murphy, A Matter of Force: The Redefinition of Rape*, 39 A.F. L. Rev. 19, 26-34 (1996).
 46. 10 U.S.C. § 925 (2000). Sodomy consists of unnatural carnal copulation, defined as taking into one's mouth or anus the sexual organ of another, placing another's sexual organ in one's mouth or anus, or to have carnal copulation in any opening of the body other than the sexual parts. M.C.M. para. 51c (2002).
 47. 10 U.S.C. §§ 133-134 (2000) (These sections criminalize conduct unbecoming an officer and conduct prejudicial to good order and discipline or of a nature to bring discredit on the armed forces, respectively.). Article 133 criminalizes "action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, severely compromises [his or her character], or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." M.C.M. para. 59c(2) (2002). Article 134 applies to all ranks and comprises offenses that are specified in the Manual for Courts-Martial, and acts that are only criminal because they are prejudicial to good order and discipline or service-discrediting. See *supra* notes 44-46; M.C.M. para. 60 (2002).

conduct unbecoming an officer.⁴⁸ Choosing among all of these potential offenses is not easy and often results in so-called "stacking" of the charges—charging the accused with all that may apply and letting the court members sort it out. Selecting the wrong charge or overcharging can certainly result in an improper verdict.⁴⁹

Further, although the UCMJ prohibits reprisals—such as lowered efficiency reports—against court members for making decisions that the convening authority dislikes,⁵⁰ court members know that the commander can harm their careers without taking an action severe enough to violate the prohibition against reprisals, such as "damning [the court member] with faint praise on an efficiency report."⁵¹ In today's military, you don't get promoted unless you "always exceed requirements" and should be "promoted ahead of contemporaries," as opposed to "usually exceeding requirements" where you should be "promoted with contemporaries." Trying to prove that faint, but career-killing praise is a reprisal for a court-martial decision is problematic at best. To justify the report of "faint praise," the high-ranking officer who wrote the report would simply have to say that the efficiency report was accurate because the officer in question always met requirements and frequently, but not *always*, exceeded them, and thus should be promoted along with his or her contemporaries.⁵²

Another problem with the convening authority's control over courts-martial is that the convening authority decides many pretrial motions. Defense counsel must submit requests to produce witnesses to the trial counsel (prosecutor), who works for the convening authority. If the trial counsel does not believe that the law requires their production, the defense may litigate the matter before the military judge.⁵³ Requests for expert witnesses, however, must be made directly to the convening authority. Again, refusal may be litigated

48. 10 U.S.C. § 934.

49. See Kay, *supra* note 25. The author concludes:

From these cases one can begin to understand how unpredictably sexual harassment is handled in the military courts. The wide variety of charges illustrates the inconsistency of sexual harassment enforcement and punishment. In addition, it is apparent that a body of consistent case law on sexual harassment has not been developed in the military court.

Id. at 329.

50. The UMCJ, 10 U.S.C. § 837 (2000), prohibits any convening authority or commanding officer from reprimanding any court member, military judge, or counsel with respect to the findings or sentence adjudged by the court. Nor may they evaluate the performance of duty of any court member in any fitness or efficiency report used to determine promotions, assignments, retention on active duty, and the like.

51. Tomes Interviews, *supra* note 1.

52. See Michael I. Spak & Jonathan P. Tomes, *Courts-Martial: Time to Play Taps?* 28 S.W. U. L. REV. 481 (1999).

53. R. COURTS-MARTIAL 703(c)(2).

before the military judge.⁵⁴ Obviously, lack of witnesses harms the truth-finding process.

Convening authorities also decide whether to grant immunity to witnesses⁵⁵ and whether to enter into plea bargains.⁵⁶ Because the military may view the victim of sexual harassment as a suspect, as in a case in which a regulation bans dating between a trainee and a drill instructor, a refusal to grant immunity to the victim may result in the greater offender—the one who has abused his higher rank and position—going free. Further, because of the way that convening authorities grant immunity, coupled with an order to testify, significant potential exists for an alleged victim of fraternization either to lie or to exaggerate the culpability of the higher ranking servicemember on trial. Although the order to testify is usually couched in terms of testifying “truthfully,” it is the trial counsel who will decide whether the testimony is truthful. Often, the immunity and order to testify are coupled with the preferral of court-martial charges against the less culpable, lower ranking female servicemember and a discharge in lieu of court-martial if she testifies “truthfully” against the higher ranking defendant. This system puts an alleged victim who either fabricated a sexual harassment complaint or exaggerated it in the unenviable position of having to testify so as to perpetuate the lie or the exaggeration to avoid trial herself, again hardly conducive to arriving at the truth. The warrior mystique in the form of the mere WAC rule (as mentioned *supra*, under the mere WAC rule, a female servicemember must be either a lesbian or a whore but is certainly not a lady) is often apparently in operation in such a situation.

The final problem with command control over courts-martial is the problem of illegal command influence. Although much command control is not illegal, such as the power to select court members,⁵⁷ conven-

54. R. COURTS-MARTIAL 703(d).

55. R. COURTS-MARTIAL 704(c).

56. R. COURTS-MARTIAL 704. The military pretrial agreement, what civilians would call a “plea bargain,” differs from civilian practice in that it places a ceiling on the punishment. If the court-martial imposes a lesser punishment, the accused gets the benefit of that lesser punishment and the pretrial agreement was nothing more than an insurance policy. If, however, the court-martial sentences the accused to a more severe punishment, the convening authority must reduce the sentence to that specified in the plea agreement. *See generally*, Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice: In Many Instances, Service Members Accused of Crime Are Granted More Rights Than Civilians*, 5 SUM. CRIM. JUST. 2, 37 (1990). For a contrary view comparing military and civilian justice, see Spak & Tomes, *supra* note 52.

57. *See supra* notes 50–56 and accompanying text. The lawful participation of the commander in the system is one of the dominant features of the military justice system. Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261 (1996) (citing DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 255 (1992)). When, however, commanders and convening authorities try to influence decisions that should be independent of command and

ing authorities and other commanders who go too far in controlling courts-martial may violate Article 37 of the UCMJ, which prohibits illegal command influence.⁵⁸ Notwithstanding this prohibition, military officials have continued to attempt to influence courts-martial results improperly. Among recent such attempts are the following:⁵⁹

- (1) Issuing policy statements that castigate a certain class of offenders, state that they should be removed from the military, or discourage witnesses from testifying for the defense.
- (2) Making speeches that stress the above points to audiences, including potential witnesses and court members.
- (3) Publicly humiliating the accused, as by stripping them of unit insignia in a public military formation, thereby stripping the accused of the presumption of innocence and biasing potential court members and witnesses.
- (4) Witness tampering, consisting of intimidating witnesses to prevent them from testifying or punishing those that do.

Although such actions have great potential to prejudice the case, military appellate courts have developed such a high standard for prevailing on an illegal command influence claim that the accused seldom gets meaningful, if any, relief.⁶⁰ Further, finding evidence of illegal

convening authority prerogatives, it becomes "illegal" or "unlawful" command influence as prohibited by the UCMJ, 10 U.S.C. § 837 (2000). Hollingsworth, *supra*. Nor is illegal command influence limited to commanders and convening authorities. Military appellate courts have applied Article 37 to staff officers, noncommissioned officers, and military judges. *Id.*

58. The UCMJ, 10 U.S.C. § 837(a), reads:

(a) No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive or procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

Section (b) of Article 37 prohibits any person subject to the UCMJ from evaluating the performance of any member of a court-martial in the preparation of a fitness or similar report or from giving a less favorable rating to counsel for the accused because of the zeal with which counsel represented the accused.

59. Deana M.C. Willis, *The Road to Hell Is Paved with Good Intentions: Finding and Fixing Unlawful Command Influence*, ARMY LAW., Aug. 1992, at 3, 6-12.
60. Under the so-called *Ayala/Stombaugh* test, the defense must first demonstrate that the alleged source of illegal command influence acted with the mantle of

command influence is problematic, at best. Those who were illegally influenced, or witnesses thereto, may be reluctant to risk their careers by informing on their superiors. Further, military defense counsel may not want to accuse these commanders or others who may sit on the lawyer's future promotion boards of illegal command influence.⁶¹ Also, alleging illegal command influence is not likely to improve one's chances for a favorable pretrial agreement (plea bargain) or for clemency if the court-martial imposes a harsh sentence.⁶² Some of the effects of the warrior mystique appear in these results.

command authority. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). *Ayala* places the burden on the defense to produce sufficient evidence to raise the issue and permits the court to decide that the evidence of the alleged illegal command influence was not strong enough nor prejudicial enough to grant relief. *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995). See Lawrence J. Morris, *This Better Be Good: The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49.

61. Perhaps the most egregious example of a defense counsel being "punished" for raising illegal command influence resulted in a congressional inquiry. An Army lawyer who raised an illegal command influence issue for one of his appellate clients, after his supervising attorney, a full colonel, told him not to, was non-selected for promotion to lieutenant colonel when his supervisor later sat on the promotion board. The Army Board for Correction of Military Records found that the colonel should not have sat on the promotion board and ordered the promotion to lieutenant colonel. As a result of the congressional inquiry, the Acting Judge Advocate General of the Army was not confirmed as Judge Advocate General and retired. A nomination to the grade of brigadier general also failed, and the President withdrew two other nominations for brigadier general. One of these withdrawn nominations for brigadier general was for the colonel who had "punished" the defense counsel and later sat on the counsel's promotion board. STAFF OF 102D CONG., SENATE COMM. ON ARMED SERVICES, REPORT ON THE INVESTIGATION OF ISSUES CONCERNING NOMINATIONS FOR GENERAL OFFICER POSITIONS IN THE JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, S. REP. NO. 102-1, 2d Sess. (1991).
62. Under Rule of Courts-Martial 705, a convening authority may enter into a plea bargain, known as a "pretrial agreement," with the accused. In cases in which the court-martial adjudges a more severe sentence than that called for in the pretrial agreement, the convening authority must then reduce the sentence to that called for in the agreement. If the court-martial adjudges a less severe sentence, then the accused has "beat the deal" and gets the lesser sentence, relegating the plea bargain to the status of unused insurance against a more severe sentence. See generally, Gilligan & Wims, *supra* note 56, at 37.

In any case, whether a pretrial agreement exists or not, the convening authority may grant clemency by disapproving the entire sentence or any part thereof. Rule of Courts-Martial 705 1107(d) specifies that the convening authority may for any or no reason disapprove the sentence in whole or in part, mitigate the sentence, or change a punishment to one of a different nature, as long as doing so does not increase the severity of the punishment. For example, the convening authority could change six months' confinement to, say, two months' restriction, but could not change such a period of restriction to confinement. The granting of clemency by convening authorities is very rare. More often, they want to, but cannot, increase the sentence. See R. COURTS-MARTIAL 705.

Although the requirement to prove guilt beyond a reasonable doubt is appropriate at courts-martial that can impose criminal sanctions,⁶³ this high burden of proof may result in perpetrators of sexual harassment "getting off," and thus failing to vindicate actual victims of such harassment. For example, although only Sergeant Major of the Army Gene McKinney and the six women whom he was accused of sexually harassing⁶⁴ will ever know what, if anything, really happened, commentators have postulated that the heavy burden of proof beyond a reasonable doubt⁶⁵ or the so-called "good soldier" defense led to the acquittal. Military Rule of Evidence 404(a)(1) is an exception to the general rule that evidence of a person's character or a trait thereof is inadmissible to prove that the person acted in conformity with that character or trait on a particular occasion. Rule 404(a)(1) permits introduction of a "pertinent" character trait.⁶⁶ In the military, general good military character qualifies as such, as do as other pertinent character traits.⁶⁷ The theory is simple: good soldiers do not commit crimes.⁶⁸ Because servicemembers receive periodic performance evaluations and often commendations and decorations for duty performance, adducing evidence of good military character is seldom difficult.⁶⁹ In the case of a high-ranking officer or noncommissioned officer, such as Sergeant Major McKinney, such evidence can be overwhelming. Selection to be the highest ranking enlisted member of one's service requires one's record to be beyond stellar. This aspect of the warrior mystique seems to involve closing ranks: if other com-

63. Under Rule of Courts-Martial 920(e), the military judge must instruct the court members that "[t]he accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt." R. COURTS-MARTIAL 920(e).

64. Sergeant Major McKinney was accused of pressuring female subordinates for sex, forced kissing, and boasting of his sexual prowess to the six women and one sexual encounter. See Gross, *Former*, *supra* note 8, at A1; Komarow, *supra* note 8, at 3A. The court-martial did, however, convict him of one obstruction of justice offense for attempting to coach the testimony of one of his accusers. He was demoted one grade and reprimanded. Jane Gross, *Sergeant Major Gets One-Step Demotion But No Time in Jail*, N.Y. TIMES, Mar. 17, 1998, at A1.

65. Editorial, *The McKinney Verdict*, N.Y. TIMES, Mar. 17, 1998, at A24.

66. Military Rule of Evidence 404(a)(1) is identical to Federal Rule of Evidence 404(a)(1). See generally, Elizabeth Lutes Hillman, Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999).

67. For example, an accused's character for truthfulness would be relevant in a prosecution for making a false official statement. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 366 (1986).

68. See, e.g., *United States v. Vandelinder*, 20 M.J. 41 (C.M.A. 1985) (finding that evidence of good military character should have been admitted at trial for drug offenses, because one with good military character is less likely to commit offenses that strike at the heart of military discipline and readiness).

69. Captain Andrea, DAD Note, *Expanding the Good Soldier Defense: Use of Character Evidence as a Defense at Trial*, ARMY LAW., Dec. 1993, at 30.

manders have given the accused good work evaluations, then the accused must be a good person and therefore innocent of all charges lodged by "some woman."

Thus, to convict a high-ranking officer or noncommissioned officer of sexual harassment, the high-ranking court members must believe the lower ranking complainant, whose credibility cannot be bolstered by evidence of good military character,⁷⁰ against the higher ranking accused, who can adduce evidence of his good (or overwhelmingly good) military character.⁷¹ Unless the lower ranking complainant has a lot of corroborating evidence, guess which one a court-martial is likely to believe.⁷²

Finally, even the U.S. Supreme Court has opined that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"⁷³ and certainly were not designed to protect servicemembers from discrimination.⁷⁴ Courts-martial are purely criminal tribunals and are empowered only to determine guilt or innocence and impose a sentence on a guilty accused.⁷⁵ Although

70. Military Rule of Evidence 404(a)(2) permits only evidence of a pertinent trait or character of the victim of a crime offered by an accused, or by the prosecution to rebut the same, or evidence of peacefulness of the victim offered by the prosecution in a homicide or an assault case to rebut evidence that the victim was the aggressor. The federal counterpart allows such use only in homicide cases. FED. R. EVID. 404(a)(2). Under Military Rule of Evidence 404(a)(2), the accused can use the section to attempt to prove that the victim of an assault or homicide has character traits that tend to prove that the victim may have been responsible for the crime. Good military character would hardly prove that the victim was responsible for the crime. Military Rule of Evidence 608(a) allows an attack on the credibility of a witness or the rehabilitation of the witness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) such evidence is admissible only after the character of the witness for truthfulness has been attacked. Again, general good military character would not qualify.

71. See Hillman, *supra* note 66, at 906-09.

72. See, e.g., J. Lancaster, *In Military Harassment Cases, His Word Outranks Hers*, WASH. POST, Nov. 15, 1992, at A1; Editorial, *McKinney Case Showcases Military Law's Shortcomings*, USA TODAY, Mar. 16, 1998, at 14A; *All Things Considered: Fort Hood Reactions*, (NPR radio broadcast, Mar. 16, 1998) (quoting Army officer who stated, "the outcome of the Gene McKinney case proves what [a female servicemember]'s already known . . . the more a superior has on his collar, the more he'll get away with."). Although officers and noncommissioned officers do not always wear their rank on their collars, the meaning is plain.

73. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) (holding that off-post offenses must be "service-connected" for the military to exercise jurisdiction over them), *overruled by Solorio v. United States*, 483 U.S. 435 (1987).

74. *Id.*

75. Col. William Winthrop's explanation of the criminal nature of courts-martial is as true today as it was in 1920:

[T]he court-martial is strictly a criminal court. It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt, or award damages in favor of an individual. . . . Even where it tries and convicts

the military judge may decide whether military law enforcement authorities coerced a conviction or conducted an illegal search, military judges and court members have no particular competence in deciding sexual harassment claims, even if they had jurisdiction to consider anything other than whether the accused is guilty of some offense under the UCMJ. Thus, even if a court-martial believes a sexual harassment complainant and convicts the accused, the victim's only compensation will be the knowledge that her complaint was vindicated and that her harasser was punished.

IV. THE MILITARY CANNOT ADEQUATELY COMPENSATE FOR SEXUAL HARASSMENT

A military victim of sexual harassment may not suffer employment-related losses, such as lost wages, because military law would not excuse a harassment victim who went absent without leave ("AWOL") because of the harassment—which would be the military version of a constructive discharge.⁷⁶ In *United States v. Roberts*,⁷⁷ the Navy-Marine Court of Military Review overturned the AWOL conviction of Seaman Susan Sutek, finding that her fear of an impending shipboard initiation that had elements of sexual harassment was sufficient to excuse her absence because of duress.⁷⁸ In *United States v. Biscoe*,⁷⁹ however, the Court of Appeals for the Armed Forces upheld the guilty plea of a female officer who contended on appeal that the military judge had not made sufficient inquiry into her possible de-

an accused for an offense involved in an obligation incurred or injury done to another person, . . . it cannot adjudge that the debt be paid, that the property be returned, or that its pecuniary value or the amount of the damage, be made good to the party aggrieved. Its judgment is a criminal sentence, not a civil verdict: its proper function is to award *punishment* upon the ascertainment of guilt.

WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49-50 (2d ed. 1920).

For a more current view, consider William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971) ("[I]t seems too clear for argument that courts-martial are criminal courts, possessing penal jurisdiction exclusively and performing a strictly judicial function in enforcing a penal code and applying highly punitive sanctions.").

76. A constructive discharge occurs when an employer deliberately makes an employee's working condition so intolerable that the employee is forced into an involuntary resignation. *Spence v. Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993).
77. 14 M.J. 671 (N.M.C.M.R. 1982), *rev'd as to Roberts*, 15 M.J. 106 (C.M.A. 1983). As to Seaman Ronald Roberts, the husband of Seaman Sutek, the Navy-Marine Court of Military Review approved only a sentence of no punishment. The Court of Military Appeals reversed the lower court's decision as to Seaman Roberts, reinstating his adjudged punishment.
78. An accused is excused from criminal responsibility under the defense of duress if she had a reasonably grounded fear of the receipt of serious bodily injury. R. COURTS-MARTIAL 916(h).
79. 47 M.J. 398 (C.A.A.F. 1998).

fense of duress based on sexual harassment. The court focused on her lack of fear of serious bodily injury, a fear that the Navy-Marine Court had found present in Seaman Sutek's case. Thus, it appears that a servicemember cannot "constructively discharge" herself from the military because of sexual harassment, unless that harassment puts her in reasonable fear of serious bodily injury.

Of course, many times the military ends up discharging the victim of the harassment. She may have violated the same regulations against fraternization that the accused did, although she would clearly be less culpable. Or the higher ranking harasser may, upon suspecting that his improper actions may become known, begin his defense by discrediting the victim, perhaps by documenting her poor duty performance and so on. In the military culture, in which arriving to work five minutes late is a criminal offense,⁸⁰ any supervisor can easily document "poor" duty performance by counseling statements, reprimands, and poor efficiency reports, as well as by punitive measures, such as nonjudicial punishment and courts-martial. Low-ranking victims may find themselves facing charges and receiving a grant of immunity and an administrative discharge in return for testifying "truthfully" against the accused.⁸¹ Because the harassment victims usually want out of the military by this point, they will accede to this procedure even when it results in a less-than-fully-honorable discharge and the corresponding loss of military and veteran's benefits.⁸² Of course, other victims may continue to serve in the military. Any military sexual harassment victim, however, may suffer damages other than the ones that sexual harassment law recognizes, such as intentional infliction of emotional distress, pain and suffering, invasion of privacy, and others.⁸³ Is there any avenue of redress for such injuries in the military?

As for administrative remedies within the military, only three exist, and none of them has the power to afford much relief. First, a victim of sexual harassment may file an Article 138 complaint with

80. Failing to go to, or going from, one's appointed place of duty is a violation of Article 86 of the Uniform Code of Military Justice. 10 U.S.C. § 886 (2000). Absence without leave is punishable by confinement for one month and forfeiture of two-thirds pay for one month. M.C.M. para. 10e(1) (2002).

81. See *supra* notes 66-72 and accompanying text.

82. Less than fully "honorable" discharges include "general" discharges, which are under honorable conditions and entitle the recipient thereof to military and veteran's benefits and "other-than-honorable" discharges, which generally do not result in the receipt of such benefits. Only a court-martial may adjudge "punitive" discharges, bad conduct, and dishonorable discharges that result in the loss of all benefits. The officer version of a punitive discharge is a "dismissal." JONATHAN P. TOMES ET AL., *SERVICEMEMBER'S LEGAL GUIDE* 38-46 (4th ed. 2002).

83. LAWYERS COOPERATIVE PUBLISHING, *HANDLING SEXUAL HARASSMENT CASES* § 28 (1993).

her commander.⁸⁴ If the commander denies redress, the complaint is forwarded up the chain of command to the officer exercising general court-martial jurisdiction. The convening authority conducts an inquiry, grants or denies the relief, and sends a report to the service secretary.⁸⁵

But as discussed *supra*,⁸⁶ commanders are loath to find sexual harassment in their commands, and short of transferring or disciplining the alleged offender, they have little ability to compensate the victim. An article in the *Southern California Review of Law and Women's Studies* pointed out flaws in using Article 138 to correct sexual harassment problems:

Although Article 138 does give service people an avenue for redress, it is not adequate for sexual harassment purposes because . . . it requires the service member to go through the chain of command for relief. Recent events surrounding the Tailhook scandal and the responses of both the female service-members who were assaulted and their superiors display this weakness in the Article. When a Navy Lieutenant helicopter pilot filed a complaint with her boss, he replied, "That's what you get for going to a hotel party with a bunch of drunk aviators." Another problem with Article 138 is that it applies only to wrongs committed by a commanding officer upon a subordinate. The provision will not extend to sexual harassment between fellow enlisted personnel or to harassment which is visited upon a commander by a subordinate. Furthermore, depending on which service the victim is in, she may not even have the right to a military attorney.⁸⁷

Second, a servicemember can obtain review of his or her discharge from his or her service's discharge review board. Such a board can change an unfavorable discharge to a more favorable one, but it cannot revoke the discharge. Further, review boards cannot award damages for improper discharge or anything else.⁸⁸ Finally, boards of correction of military or naval records may correct such records to correct an error or remove an injustice.⁸⁹ Although such a correction could result in the award of back pay for an improper discharge or reinstatement, these boards cannot award other damages.⁹⁰ Further, to get relief, one must have an incorrect record to correct. In *Saal v.*

84. 10 U.S.C. § 938 (2000) (Article 138 of the UCMJ).

85. *Id.*

86. *See supra* note 36 and accompanying text.

87. Murray, *supra* note 20, at 290-91.

88. 10 U.S.C. § 1553 (2000). *See* David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 11, 19.

89. 10 U.S.C.A. § 1552 (West Supp. 2003).

90. *See* Von Hoffburg v. Alexander, 615 F.2d 633, 640-41 (5th Cir. 1980) (holding that inadequacy of a remedy available from the Army Board for Correction of Military Records, which lacks authority to award damages, is outweighed by considerations of efficiency and agency expertise underlying the exhaustion requirement and by the availability of other remedies, such as reinstatement and payment of backpay).

Middendorf,⁹¹ the court noted that, by issuing an honorable discharge, the Navy "effectively precluded review . . . by the Board for Correction of Naval Records for there [was] no record left to correct."⁹² The board does not conduct an independent investigation,⁹³ nor does the board's authority extend to striking down military policy. Moreover, the board probably lacks the competence to decide constitutional issues.⁹⁴ As one commentator noted:

[The Board of Corrections] is an inadequate means to redress sexual harassment complaints because it offers no aid unless a victim has a negative comment on her record as a function of, or in retaliation for, complaining about sexual harassment. Sexual harassment is rarely manifested by recorded admonishments. Moreover, "injustice" is not defined, service-members have no right to a hearing, and complainants rarely know when they have exhausted intramilitary remedies and earned the right to appeal to a civilian court. Furthermore, civilian courts usually defer to the BCMR's decisions.⁹⁵

If, as it appears, the military interservice remedies cannot afford relief to a victim of sexual harassment, what about the federal courts? At present, sexual harassment victims have no greater chance for redress in the federal courts than in the military system because of the so-called *Feres* doctrine and because Title VII does not apply to the military.

Fifty years ago, in *Feres v. United States*,⁹⁶ the U.S. Supreme Court held that servicemembers could not sue the military for monetary damages. *Feres* involved lawsuits brought under the Federal Tort Claims Act ("FTCA")⁹⁷ by three active duty servicemembers who were victims of negligence by military personnel acting within the

91. 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd on other grounds sub nom.*, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981).

92. *Id.* at 197.

93. *See, e.g.*, 32 C.F.R. § 723.3(e) (2003).

94. *See Walmer v. United States Dep't of Defense*, 835 F. Supp. 1307, 1310–11 (D. Kan. 1993), *aff'd*, 52 F.3d 851 (10th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995) (finding that a servicemember pending discharge for homosexual conduct was not required to appeal her discharge to the Army Board for Correction of Military Records ("ABCMR") before asserting the unconstitutionality of the regulations under which she was discharged in federal court, because the ABCMR has no power to strike down military policy and constitutional issues are inappropriate for decision by an administrative body).

95. Murray, *supra* note 20, at 286–87.

96. 340 U.S. 135, 146 (1950).

97. 28 U.S.C. §§ 2671–2680 (2000). The FTCA waived sovereign immunity for certain torts committed by employees of the United States. The relevant portion reads:

[F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b).

scope of their employment. The Court focused on three rationales for its decision. First, the FTCA did not create an action for servicemembers against their military superiors or the government itself, because the FTCA created no new causes of action and because no American cause of action ever allowed a servicemember to recover damages from his or her military superiors.⁹⁸ Second, because the FTCA bases liability on the law of the state where the act or omission occurred and because servicemembers have no control over their assignments, it would be nonsensical to base liability on the law of the forum state.⁹⁹ Finally, because servicemembers have a generous statutory scheme of military and veteran's benefits, Congress must not have intended to give them an additional remedy under the FTCA.¹⁰⁰ Thus, servicemembers cannot maintain a suit if the injury is "incident to service."¹⁰¹

Notwithstanding almost universal scholarly criticism of the decision,¹⁰² the U.S. Supreme Court has continued to affirm *Feres*. For example, in *Chappell v. Wallace*,¹⁰³ the Court extended *Feres* to constitutional torts committed by the military, holding that servicemembers could not recover monetary damages for such wrongs.¹⁰⁴ *United States v. Stanley*¹⁰⁵ affirmed *Chappell*, noting that the courts should not allow lawsuits that would call into question military decisionmaking:

Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision making), the mere process of arriving at correct conclu-

98. *Feres*, 340 U.S. at 141-42.

99. *Id.* at 143.

100. *Id.* at 140.

101. *Id.* at 146.

102. See, e.g., Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383 (1984); Captian Robert L. Rhodes, U.S.A.F., *The Feres Doctrine After Twenty-Five Years*, 18 A.F. L. REV. 24 (1976); David E. Seidelson, *The Feres Exception to the Federal Tort Claims Act: New Insight into an Old Problem*, 11 HOFSTRA L. REV. 629 (1983); Jonathan P. Tones, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93 (1990); Donald Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C. L. REV. 489 (1982).

103. 462 U.S. 296 (1983).

104. *Id.* at 305. *Chappell* involved claims of racial discrimination. Although the U.S. Supreme Court's earlier decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), authorized suits for damages against federal officials who had violated the plaintiffs' constitutional rights, the *Chappell* Court held that the *Bivens* limitation on such remedies when "special factors counseling hesitation," 403 U.S. at 396, are present applied to suits by military members against their superiors, thereby foreclosing relief. *Chappell*, 462 U.S. at 304. The *Chappell* Court focused on the unique disciplinary structure of the military and Congress' activity in the field. *Id.* The Court did note that injunctive relief or other forms of relief not involving damage awards remained available. *Id.*

105. 483 U.S. 669 (1987).

sions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.¹⁰⁶

Obviously, many sexual harassment cases could involve extensive inquiry into military matters. The disruption to the "military regime" caused by allowing such lawsuits, however, would hardly seem greater than the disruption caused by the Navy's investigation into Tailhook, the Sergeant Major McKinney case, discussed *supra*, or the Aberdeen Proving Ground trainee sexual harassment cases.¹⁰⁷

Further, there is not any real evidence that barring servicemembers from suing harms discipline. *Feres* and its progeny have

106. *Id.* at 683.

107. At the 1991 Tailhook convention, junior Navy officers assaulted approximately eighty-three women. As to the effect of the investigation, one commentator noted:

After allegations surfaced of junior Naval officers' assaults on women at the Tailhook convention, the Navy's attempts to police itself revealed a disturbing pattern of outright sexism and corruption. The executive branch during the Bush Administration was also angered by the Inspector General's inability to investigate the allegations successfully. The Inspector General and the Naval Investigative Service Command began preliminary investigations more than a month after the incident and concluded them only seven months later. After more than 1500 interviews with officers and civilians who had been present at the convention, "investigators were able to identify only two suspects because of officers' refusals to talk about the incidents." The Inspector General's report also revealed that certain commanding officers refused to order their subordinates to be photographed so that victims would not be able to identify their assailants. . . .

As the investigation progressed, scandal heaped upon scandal. H. Lawrence Garrett III, the Secretary of the Navy and the head of the Tailhook investigation, asked the Pentagon to take over the investigation when reports surfaced that he was present at the festivities and that fifty-five pages of documents that revealed his presence were deleted from the original reports. . . . Using lie detectors, undercover agents, and detailed computer analyses to dismantle the "wall of silence" that hampered earlier investigations, the Inspector General found that even more women than suspected had been assaulted and identified 175 naval officers for possible disciplinary action.

Murray, *supra* note 20, at 282-83. Of all these suspects, none were convicted by court-martial, and only fifty were disciplined at all, by fines, reprimands, and the like. *Id.* at 283-84.

In the Aberdeen Proving Ground case, female trainees accused drill sergeants of sexual harassment. The investigation into the allegations uncovered out-of-control sexual misconduct. "A parade of former trainees, all women . . . testified that drill sergeants and trainees alike routinely initiated consensual sexual relations, a violation of military law." Elaine Sciolino, *Rape Witnesses Tell of Base Out of Control*, N.Y. TIMES, Apr. 15, 1997, at A8. These witnesses testified about the freewheeling, libidinous atmosphere in which sexual activity between superiors and subordinates was rampant and drill sergeants competed to have sex with as many trainees as they could. *Id.* at A12. How, then, could the disruption caused by federal court litigation of a sexual harassment complaint be any more disruptive to the "military regime?"

not stopped servicemembers' suits; rather, *Freres* and its progeny have made it next to impossible for servicemembers to win. Servicemembers have still brought uncounted cases against their superiors and the military.¹⁰⁸ *Feres* and its progeny also do not factor in the costs of not affording servicemembers a remedy for sexual harassment and other forms of discrimination.¹⁰⁹ Further, everyone other than servicemembers may sue the military for negligence and constitutional torts, regardless of any alleged harm to the military from such litigation.¹¹⁰ Many of those suits involve federal civilian employees of the armed forces suing for sexual harassment.¹¹¹ Nonetheless, Congress would have to legislatively overturn *Feres* for servicemembers to be able to maintain sexual harassment actions in the courts.

108. See Rhodes, *supra* note 102. Rhodes states:

[T]here is no evidence that negligence actions by service members over the past twenty-five years has degraded the military mission.

The modern soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, service members have vigorously asserted their positions in direct court action against high ranking officials. The proliferation of this constitutional litigation apparently has not interfered substantially with military operations.

Id. at 42.

109. Uncorrected sexual harassment and other forms of discrimination can certainly harm morale, unit cohesion, and even the ability to fight. Discrimination against black soldiers in Vietnam resulted in racial violence and impaired combat efficiency. D. CORTWRIGHT, *SOLDIERS IN REVOLT* 41 (1975) (recounting black soldiers' refusal to go into the field); Howard J. De Nike, *The New "Problem Soldier"—Dissenter in the Ranks*, 49 IND. L.J. 685, 687–89 (1974) (asserting that racial violence was prompted by underlying resentment by blacks of unequal treatment); see also *id.* at 56, 140, 154–55, 210, 218–19 (recounting disobedience of orders and threats to readiness inherent in response to discrimination).

110. See Tomes, *supra* note 102, at 111.

111. *E.g.*, *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999) (holding that the district court improperly invaded the province of the jury in granting summary judgment for the Navy in a sexual harassment action by a former employee); *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) (affirming that the Department of Defense was not vicariously liable for a supervisor's harassment because of a functioning antiharassment policy and prompt and effective action taken against harassing behavior); *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475 (9th Cir. 1997) (holding that an employee was entitled to a jury trial and compensatory damages for harassment occurring after the effective date of the Civil Rights Act of 1991); *Bailey v. West*, 941 F. Supp. 1023 (D. Kan. 1996) (finding that an Army employee made sufficient allegations to support quid pro quo sexual harassment claim); *Skinner v. Caldera*, 1999 WL 1001468 (E.E.O.C.) (finding that, because the agency (Army) is liable because it knew of the sexual harassment and did not take prompt remedial action, recent U.S. Supreme Court decisions respecting the liability of an agency when a supervisor commits such harassment do not apply).

In addition to the overall *Feres* bar, the FTCA itself bars cases to redress intentional torts.¹¹² This bar applies whether the suit is based on assault or is based on negligence that resulted in an intentional tort.¹¹³ Thus, Congress would have to amend this section to permit sexual harassment claims involving intentional torts to permit victims of such harassment to obtain relief under the FTCA.

Another barrier to a lawsuit against the military, assuming that Congress overturned *Feres*, is the so-called *Mindes* doctrine. Some circuits follow the *Mindes v. Seaman*¹¹⁴ test to determine whether a military claim is justiciable. First, as a threshold matter, *Mindes* held that judicial review of military activities is permissible when two conditions are met: (1) a servicemember alleged either that he or she had been deprived of a constitutional right or that the service in question had violated its own regulations; and (2) the servicemember had exhausted all available administrative intraservice remedies.¹¹⁵ After the servicemember has met that test, *Mindes* specifies four factors for a court to review: (1) "the nature and strength of the plaintiff's challenge to the military determination"; (2) "the potential injury to the plaintiff if review is refused"; (3) "the type and degree of anticipated interference with the military function"; and (4) "the extent to which the exercise of military expertise or discretion is involved."¹¹⁶ Even though the *Mindes* court intended these tests to determine whether a court will review a case or abstain therefrom, two of the criteria clearly go to the merits of a case. Thus, the court must evaluate the merits of a case before deciding whether to hear it, but it may not have enough information early in the case in order to do so properly.¹¹⁷ Not all circuits follow *Mindes*, however, and may substitute another test to determine whether a military case is justiciable.¹¹⁸

112. 28 U.S.C. § 2680(h) (2000). *Perkins v. United States*, 55 F.3d 910 (4th Cir. 1995). The 1974 amendment to the FTCA, however, added some intentional torts committed by law enforcement officers, such as assault, battery, false imprisonment, and the like, to the torts for which a plaintiff could recover. Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (2000)).

113. See *supra* note 112.

114. 453 F.2d 197 (5th Cir. 1971), *appeal after remand*, 501 F.2d 175 (5th Cir. 1974).

115. *Id.* at 201.

116. *Id.*

117. Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082, 2103 (1987).

118. The Seventh Circuit, for example, however, appears to follow *Mindes*. In *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), a dismissed Wisconsin Air National Guard officer brought a civil rights action against the National Guard. In declining to follow *Mindes*, the Seventh Circuit noted:

As the Third Circuit has pointed out, the *Mindes* approach erroneously "intertwines the concept of justiciability with the standards to be applied to the merits of the case." . . . Rather than embracing the *Mindes* balancing test, we prefer a different approach. Our inquiry does not involve a

*Hill v. Berkman*¹¹⁹ illustrates the problem with the *Mindes* doctrine and its variations with regard to Title VII¹²⁰ actions against the military. Plaintiff Hill challenged the Army's use of the combat exclusion policy contending that it was a pretext for discrimination against women. The court declined to follow cases holding that Title VII did not apply to the uniformed military,¹²¹ but rather, applied a balancing test similar to the *Mindes* test to determine whether to review a Title VII claim against the military. To avoid second-guessing common decisions that are crucial to disciplinary relationships, courts should not afford a Title VII remedy for "isolated individual allegations of discrimination," which are better left to intramilitary remedies.¹²² Even those cases involving policies that are applicable to a large number of servicemembers should not be reviewed, unless "the military decision was clearly arbitrary and erroneous, with a harmful effect present at the time the dispute reaches the court."¹²³

Thus, the *Hill* court used a variant of the *Mindes* test to vitiate Title VII. Although Title VII does not permit either individual instances of discrimination or discriminatory policies,¹²⁴ the *Hill* test permits hearing military cases involving only the latter. Further, although Title VII does not permit a good faith defense,¹²⁵ the *Hill* decision implicitly permits such a defense by adopting the clearly arbitrary standard.

Even assuming that a military victim of sexual harassment could bring a lawsuit for damages, she would find another bar to recovery—the law that protects victims of civil rights violations. Title VII¹²⁶ is "the exclusive judicial remedy for claims of discrimination in federal employment."¹²⁷ Although one might think that uniformed military members were federal employees, at least for protection from discrimination, the overwhelming weight of authority holds that Title VII does

balancing of individual and military interests on each side, but rather a determination of whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree.

Knutson, 995 F.2d at 768 (citations omitted).

119. 635 F. Supp. 1228 (E.D.N.Y. 1986).

120. 42 U.S.C. § 2000e-2000e-17 (2000).

121. *Hill*, 635 F. Supp. 1228.

122. *Id.* at 1241.

123. *Id.* The court believed that such a highly deferential test would allow the military the necessary flexibility to make and alter policies, *id.*, but it did not explain why military policies with a discriminatory impact should be afforded more deference than other organizations' policies. Griffin, *supra* note 117, at 2094.

124. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (individual discriminatory actions); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (discriminatory institutional policy).

125. *Griggs*, 401 U.S. at 432.

126. 42 U.S.C. § 2000e-2000e-17 (2000).

127. *Brown v. Gen. Services Admin.*, 425 U.S. 820, 835 (1976).

not extend to uniformed military personnel.¹²⁸ Thus, not only must Congress legislatively overrule *Feres* to permit sexual harassment suits against the military, but it also must ensure that courts do not use *Feres* or a variant thereon as a court-made bar to such lawsuits and make it clear that uniformed military members are protected by Title VII.

The recent case of *Shiver v. United States*¹²⁹ illustrates the effect of these bars to sexual harassment lawsuits. The plaintiff was a trainee who was raped by her drill sergeant at Aberdeen Proving Grounds.¹³⁰ She sued under the FTCA. The U.S. District Court for the District of Maryland found against her on all three grounds: *Feres* barred her claim; the intentional tort exception of the FTCA barred her claims; and federal rights laws prohibiting sexual harassment of federal employees do not give rise to civil liability in favor of active duty military personnel.¹³¹ Because the court found no jurisdiction, it did not have to decide whether *Mindes* made the case nonjusticiable.

128. *E.g.*, *Gonzalez v. Dep't of Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (9th Cir. 1978). The only case to find sexual discrimination in the military to be actionable under Title VII is *Hill*, 635 F. Supp. 1228 (holding that Title VII could apply in limited circumstances involving facially discriminatory policies). *Hill*, however, was not a sexual harassment case and would extend jurisdiction only to outrageous incidents of discrimination, because investigations into less serious military decisionmaking would be too intrusive. *Id.* at 1241.

129. 34 F. Supp. 2d 321 (D. Md. 1999).

130. See *supra* note 107 for a general discussion of the harassment at Aberdeen Proving Ground.

131. *Shiver*, 34 F. Supp. 2d at 322-23. The court could hardly have been more promilitary:

The military services of this country cannot effectively be managed or deployed if subject to litigative hindsight by federal judges . . . and, contrary to plaintiff's assertion, military discipline would be adversely affected by allowing tort litigation under the FTCA, as officers' and non-commissioned officers' authority and credibility would both be open to attack outside military channels, thus undermining their authority. The resulting fear of litigation would paralyze decision-making in the one segment of our society that remains free of such paralysis, and that must remain free of it, if it is to fulfill its mission. The point needs no more discussion than that.

Id. at 322.

One doubts whether the command at Aberdeen, particularly the noncommissioned officers that committed rape and other sexual harassment, had much authority left to undermine. And their decisionmaking appears to have been so aberrant that it needed fear of something, such as litigation. Justice Brennan's dissent in *United States v. Stanley*, 483 U.S. 669 (1987), which held that *Feres* barred the claim of a soldier who was the victim of the unknowing administration of LSD during military testing, seems equally applicable to sexual harassment amounting to rape:

The Court holds that the Constitution provides [the plaintiff] with no remedy, solely because his injuries were inflicted while he performed his duties in the Nation's Armed Forces. If our Constitution required this result, the Court's decision, though legally necessary, would expose a

One commentator has noted that promulgating an executive order prohibiting sexual harassment in the military and setting up a system using administrative law judges or inspectors general to investigate and adjudicate claims is unlikely to be effective, because the next president could invalidate the order and the inspector general has demonstrated its inability to handle sexual harassment claims.¹³² Thus, Congress should include uniformed service personnel in Title VII. For this proposal to work, Congress must also make the military subject to the jurisdiction of the EEOC.¹³³

This commentator's proposal is for the Title VII protection for servicemembers to retain some of the military's existing grievance procedures while guaranteeing an impartial review of their complaints in federal civilian courts.¹³⁴ Such a procedure would have a number of benefits. First, filing the complaint simultaneously with the commander and the EEOC counselor as opposed to going straight to the EEOC while bypassing the command would preserve the commander's authority and permit early correction efforts. The EEOC's initial assessment should, however, result in preventing or minimizing coverups by commanders who do not want their superiors to think that they have a sexual harassment problem in their unit¹³⁵ while protecting the military from frivolous lawsuits.¹³⁶ Second, once the victim has exhausted administrative remedies, a jury could decide sexual harassment cases under a preponderance of the evidence standard.¹³⁷

tragic flaw in that document. But in reality, the Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, *military discipline*, declining to provide Stanley with a remedy because it finds "special factors counseling hesitation." This is abdication, not hesitation.

Id. at 686 (citation omitted).

For another horror story in which a federal court found that *Feres* barred relief, see *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) (holding that a lawsuit by an enlisted woman who committed suicide as a result of sexual harassment would disrupt discipline).

132. Murray, *supra* note 20, at 298.

133. See *Gonzalez*, 718 F.2d at 928.

134. Murray, *supra* note 20, at 299. Murray suggests that a servicemember would first have to bring simultaneous complaints to her commanding officer and an Equal Employment Opportunity counselor. They would review the matter with the servicemember and try to resolve the matter informally. An unsatisfied complainant would then be able to file a formal complaint with the EEO officer, who would investigate the claim. If the EEO resolution is unsatisfactory, the servicemember could have an EEOC hearing and bring a civil action. The extension of Title VII would permit reinstatement, back pay, or other relief. *Id.* at 299-300.

135. See *supra* note 36 and accompanying text.

136. Griffin, *supra* note 117, at 2106.

137. Professor Chamallas terms the ability of a civilian jury to decide such claims under a preponderance of the evidence standard a "valuable opportunity" and notes that civil suits have the advantage of permitting victims to be vindicated

What about the potential harm, if any, inherent in permitting servicemembers to maintain Title VII actions against the military? Commentators have asserted the following potential harms: disruption of military discipline, inability of the civilian courts to evaluate military decisionmaking,¹³⁸ disruption to the military by civilian investigators, and a perception that military personnel lack faith in their superiors if they seek recoveries from fellow servicemembers and superiors.¹³⁹ Although certain of these concerns have some superficial validity, none of them, nor the aggregate of them, justifies the ban on sexual harassment lawsuits of *Feres* and other judicial decisions on the grounds discussed above.¹⁴⁰

As to the disruption to discipline, the *Feres* doctrine, as discussed above, has not eliminated lawsuits, only recoveries.¹⁴¹ Thus, servicemembers continue to sue the military and their commanders:

[T]here is no evidence that negligence actions by service members over the past twenty-five years have degraded the military mission.

The modern soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, service members have vigorously asserted their positions in direct court actions against high ranking officials. This proliferation of this constitutional litigation apparently has not interfered substantially with military operations.¹⁴²

The Air Force's highest ranking female fighter pilot, Lieutenant Colonel Martha E. McSally, sued Secretary of Defense Donald Rumsfeld. She claimed that the military's policy requiring all female military personnel at Prince Sultan Air Force Base in Saudi Arabia when off base, even on official business, to wear the customary head-to-toe *abaya* and matching headscarf, not to drive, to ride in the back seat of vehicles, and to be escorted by males at all times was unconstitutional in that the policy discriminated against women and violated their religious freedom by forcing them to adopt the garb of another faith. Although she was not alleging sexual harassment, her suit illustrates several of the problems that victims of sexual harassment face in bringing suit against their superiors: she was not seeking monetary damages because of *Feres* and its progeny; she went through channels for seven years to try to get the policy changed; and she finally had to resort to a civilian lawsuit. A couple of years ago, it seemed that she would be damned with faint praise on her performance evaluations, after having been promoted four years before her peers, and that she

without sending offenders to jail, a compromise of great utility. Chamallas, *supra* note 12 at 363.

138. See Robin Rogers, Comment, *A Proposal for Combating Sexual Discrimination in the Military: Amendment of Title VII*, 78 CAL. L. REV. 165, 193-94 (1990).

139. Kay, *supra* note 25, at 340.

140. See *supra* notes 107-112 and accompanying text.

141. See *supra* notes 107-112 and accompanying text.

142. Rhodes, *supra* note 102, at 42.

would likely face the slow, painful fizzle of her previously stellar military career.¹⁴³ It seemed that the warrior mystique would be at work here and that, even if she were by some miracle able to win the lawsuit, get the policy changed, get promoted on time to full colonel, and get a plum assignment, she would never enjoy the same level of trust and confidence of her fellow pilots and officers and her superiors that she had enjoyed before she went outside the chain of command and made her complaint public. But the military may be changing because, in the meantime, the Senate and the House unanimously passed a law prohibiting the policy. The military responded by changing the word "require" in the policy with "strongly encourage," so she continued her suit. Using the civilian court system apparently worked for her, because Lieutenant Colonel McSally recently received a plum assignment for any pilot, and a first for an active duty woman: the first female fighter squadron commander, commanding the 354th Fighter Squadron at Davis-Monthan Air Force Base in Arizona.¹⁴⁴

Feres and its progeny do not prevent lawsuits by servicemembers seeking relief other than monetary damages or suits by civilians against the military, including civilian employees of the military departments suing for employment discrimination, including sexual harassment.¹⁴⁵ As Justice Brennan noted:

The Court fears that military affairs might be disrupted by factual inquiries necessitated by *Bivens* actions. The judiciary is already involved, however, in cases that implicate military judgment and decisions, as when a soldier sues for nonservice-connected injury, when a soldier sues civilian contractors with the Government for service-connected injury, and when a civilian is injured and sues a civilian contractor with the military or a military tortfeasor.¹⁴⁶

Further, how could a sexual harassment lawsuit be any more disruptive than the Tailhook investigation and disciplinary action, the Aberdeen Proving Ground's courts-martial, or Sergeant Major McKinney's trial? For example, the Naval Investigative Service's investigation into Tailhook comprised 1,500 interviews with Navy and Marine aviators, and the incident certainly caused other harm to good order and discipline:

The failure to deal adequately with Tailhook has had an enormous effect on the Navy. In the wake of Tailhook, the Secretary of the Navy resigned. The Senate Armed Services Committee halted all officer promotions in the Navy.

143. Ann Gerhart, *The Air Force Flier in the Ointment: Martha McSally's Garb in Saudi Arabia Chafed, So She Pressed a Lawsuit*, WASH. POST, Jan. 7, 2002, at C1-C2.

144. Carol Ann Alaimo, *Woman to Head Air Force Fighter Squad Unit*, ARIZONA DAILY STAR, May 1, 2004; Felix J. Freyer, *There Is No Map—At RIC, McSally Advises: Be Prepared to Sacrifice*, PROVIDENCE JOURNAL, May 18, 2003, at E.01.

145. See *supra* notes 108–111 and accompanying text.

146. *United States v. Stanley*, 483 U.S. 669, 703 (1987) (Brennan, J., dissenting).

Many valuable officers have lost their jobs; many more will probably follow. Morale is at a dangerous low.¹⁴⁷

In short, no evidence exists that Title VII or any other lawsuits by servicemembers against their superiors or the military itself seeking damages actually harm discipline, and assuming *arguendo* that such harm exists, it is no more harm than exists in cases in which military members sue for other redress, such as injunctive relief, or that harm which exists when civilian employees sue the military. Further, no evidence exists that such a civilian lawsuit is any more disruptive than a highly politicized sexual harassment court-martial. Finally, again assuming some harm from such suits, it pales in comparison to the disruption caused by the continuing harassment experienced in the military service. As General Douglas MacArthur noted, servicemembers' morale "will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government, or of ignorance, personal ambition, or ineptitude on the part of their military leaders."¹⁴⁸ More recently, General Frederick M. Franks, who commanded the U.S. and British forces of VII Corps during Desert Storm in the main ground attack that liberated Kuwait, discussed necessary character traits for leaders:

Soldiers need to know that we will be there for them when they need us during the battle and later.

... Integrity is one of those principles continually put to the test. . . . Integrity in command is the province of the commander. And there are litmus tests. Do we mean what we say? Does say equal do? Do we accept responsibility for our actions no matter the consequences, or in these days, the media pressure, or the instant historical reputation? Where are our loyalties? Do we return loyalty to our subordinates? . . . Do we share hardships with our troops? Do they see us and hear from us when the going really gets tough? Do we square up to the really tough calls? *Do we shine the spotlight of inquiry into any area that is called for no matter the consequences?*¹⁴⁹

He concludes that if leaders believe in their subordinates and "establish trust, mutual respect, and loyalty, there is no limit to what the organization can accomplish."¹⁵⁰

To the extent that such an action would adversely affect ongoing military operations, the proposed modification by Congress permitting such lawsuits could have a section similar to the Soldiers' and Sailors' Civil Relief Act,¹⁵¹ which permits the court to stay civil proceedings at

147. Kay, *supra* note 25, at 310.

148. Griffin, *supra* note 117, at 2109 (quoting BARTLETT'S FAMILIAR QUOTATIONS 771 (15th ed. 1982), quoting ANNUAL REPORT OF THE CHIEF OF STAFF, U.S. ARMY, FOR THE FISCAL YEAR ENDING JUNE 30, 1933).

149. General Frederick M. Franks, Jr., *The Fourth Annual Hugh J. Clausen Leadership Lecture: Soldiering Today and Tomorrow*, 158 MIL. L. REV. 130, 134-35 (1998) (emphasis added).

150. *Id.* at 136.

151. 50 U.S.C. §§ 501-593 (2000).

any stage thereof in which a servicemember is a plaintiff or defendant during his military service, unless it finds that the servicemember's ability to prosecute or defend the suit is not materially affected by reason of his or her military service.¹⁵² If the military's ability to defend itself in a Title VII action was materially affected, for instance, by a deployment of the unit involved so that government witnesses were unavailable, a similar provision could provide for a stay in such circumstances.

The argument that permitting Title VII suits would involve the judiciary in military matters that it does not have the competence to evaluate does not hold water either. First, sexual harassment cases hardly involve whether to use Navy Seals, Army Green Berets, or Marine Force Recon for a particular mission or which servicemembers should be promoted to the next higher grade based on their military records. Rather, they involve such questions as whether a particular situation qualifies as a hostile work environment or whether a particular assault or other action rises to the level of sexual harassment¹⁵³—something that federal courts do regularly. Even if such a case had the additional element of the court having to evaluate the effect of the hierarchical rank structure of the military on the conduct, both sides could educate federal judges and juries on that matter as experts do on other complicated subjects in many complicated cases, such as civil and criminal Medicare fraud cases brought under the antikickback statute,¹⁵⁴ antitrust actions, patent infringement cases,

152. *Id.* § 521.

153. The relevant regulation, 29 C.F.R. 1604.11(a) (2003), states:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

154. The federal health care antikickback statute prohibits transactions intended to induce patient referrals or to compensate one for making such referrals. 42 U.S.C.A. § 1320a-7b (2003) (criminal penalties for acts involving Federal health care programs). These extremely complicated cases may involve billing experts to testify as to whether a payment is *bona fide* or a kickback, accounting experts to testify whether an equipment lease is for fair market value, *see generally*, Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 *FORDHAM L. REV.* 383, 398-411 (1994), or comprises an illegal kickback, legal experts to explain the nuances of the statute because, as a specific intent crime, the defendant's belief that the transaction was legal under the complicated statutory and regulatory scheme is a defense. *See Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995).

and others in which the triers of fact know little about the technical aspects of the matter.

Would civilian investigators be disruptive? Possibly, but again, no more so than the military investigators in such cases as Tailhook. First, military investigators often wear civilian clothes. The Army's Criminal Investigation Division, the Naval Investigative Service, and the Air Force Office of Special Investigations typically wear civilian clothes when conducting investigations.¹⁵⁵ Second, any investigator is disruptive in a sense, military or civilian. But again, so is sexual harassment.¹⁵⁶ It is hard to imagine anything more disruptive than such situations as Tailhook or the Aberdeen Proving Ground cases, whether they ultimately end up with an EEOC investigation on top of the criminal one or not.

The argument that permitting such lawsuits would cause military members to lose faith with their superiors seems to be the most specious of all. Such an argument presumes that servicemembers do not know when their superiors commit wrongs, such as sexual harassment, do not know when their superiors fail to investigate such wrongs, do not know when their superiors cover up such wrongs,¹⁵⁷ and do not know or care that victims of such wrongs fail to receive compensation. Such an argument may also presume that those servicemembers who do know of such wrongs do not care or that they condone sexual harassment. Although a few servicemembers, such as the Tailhook aviators, may not care, nothing could be further from the truth in regard to servicemembers in general. Servicemembers do know of such wrongs, and they do care. Experiencing or learning of such wrongs and their superiors' failures to correct those wrongs clearly harms morale.¹⁵⁸ Servicemembers take an oath to support

155. See *United States v. Swift*, 17 C.M.A. 227 (1967) (involving an Air Force Office of Special Investigations agent who participated in an investigation by German police, which did not make rights warnings necessary where the agent was solely an observer, was dressed in civilian clothes, and was not introduced as a police officer).

156. See *infra* note 158 and accompanying text.

157. General Franks, *supra* note 149, states that in this information age, servicemembers are informed. "They notice. They pay attention to not only what they are doing but what is going on around them. They communicate with fellow soldiers about the mission, training, and the organization." *Id.* at 142-43.

158. From the earliest times, military experts have stressed the need to treat servicemembers well. Sun Tzu, the ancient Chinese general, opined that a primary responsibility of a general is to treat soldiers with warmth and beneficence. SUN TZU, *THE ART OF WAR* 64 (Samuel B. Griffith trans., Oxford Univ. Press 1963). The strict military disciplinarian Baron von Steuben observed that a commander's first objective should be to "gain the love of his men, by treating them with every possible kindness and humanity, inquiring into their complaints, and when well founded, seeing them redressed," BARON VON STUBEN, *I REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES* 135 (1785), *quoted in* ROBERT S. RIVKIN, *G.I. RIGHTS AND ARMY JUSTICE* 335 (1970). Subse-

and defend the Constitution, not to support and defend their commanders.¹⁵⁹ The Constitution would seem to require equal protection of the laws for victims of sexual harassment in the military as in the civilian sector. Any alleged harms to the military inherent in such lawsuits are not supported, and, to the extent that they exist, they are certainly outweighed by the disruption of the amount and nature of the sexual harassment that is occurring in today's military and by the failure to provide adequate remedies to redress those wrongs.

V. CONCLUSION

Although one of the coauthors of this Article and another one of his frequent coauthors have proposed the abolition of the military courts-martial system in times of peace¹⁶⁰ and the repeal of the so-called *Feres* doctrine, which prohibits servicemembers from suing their military commanders for monetary damages,¹⁶¹ perhaps stronger reasons exist to replace trials by courts-martial with civil rights lawsuits for sexual harassment offenses committed by servicemembers. To date, the military and in particular the military justice system have been ineffective in eliminating or at least reducing sexual harassment in the military. The military further lacks any effective mechanism for protecting the victims of sexual harassment and compensating them for the harms that they suffer. Whether or not the courts are correct that Title VII does not apply to the uniformed military, Congress should permit Title VII sexual harassment actions by servicemembers. Further, Congress should legislatively overrule *Feres*

quent military leadership theory confirms von Steuben. World War I studies demonstrated that resistance to military authority springs from, among others, degrading use of military authority. See LAWRENCE B. RADINE, *THE TAMING OF THE TROOPS: SOCIAL CONTROLS IN THE UNITED STATES ARMY* 9-10, 34-38, 78-79, 115-16 (1977). What could be more degrading than a military superior sexually harassing a subordinate and then not permitting the victim the same recourse that civilians enjoy? General McCaffery, past commander of the U.S. Southern Command, speaking of preventing war crimes against noncombatants, noted that "[i]f we treat our own soldiers with dignity under the rule of law, with some sense of compassion, then our soldiers are much more likely to act in a similar fashion toward the civil population." General Barry R. McCaffrey, *Role of the Armed Forces in the Protection and Promotion of Human Rights*, 149 MIL. L. REV. 229, 237 (1995).

159. All servicemembers take the following oath:

I, _____, do solemnly swear (or affirm) that *I will support and defend the Constitution of the United States* against all enemies, foreign and domestic; *that I will bear true faith and allegiance to the same*; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.

10 U.S.C. § 502 (2000) (emphasis added).

160. See Spak & Tomes, *supra* note 52.

161. See Tomes, *supra* note 102.

and its progeny to permit sexual harassment lawsuits by military members. Even though the doctrinal underpinnings of *Feres* and its progeny are wrong at worst or have no evidence backing them up at best, servicemembers cannot depend on the courts to protect their rights as would seem to be the federal courts' function.¹⁶² Even assuming the existence of some adverse effect on the military inherent in permitting Title VII actions for sexual harassment, that harm cannot possibly be worse than the harm from continuing serious incidents of sexual harassment. Courts-martial have not eradicated it. Zero tolerance policies have not eradicated it. Public condemnation has not eradicated it. Large damage awards might be the solution. Even if Title VII actions do not deter sexual harassment, at least its military victims will be compensated and "women constituting our Armed Forces [will be] treated as honored members of society whose rights do not turn on the charity of a military commander."¹⁶³

162. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall stated, "The very essence of civil liberty certainly consists in the right of *every* individual to claim protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163 (emphasis added). See also *Zwickler v. Koota*, 389 U.S. 241, 247 (1967) (outlining that the Constitution intended the courts to be the branch of government primarily responsible for enforcing the Bill of Rights).

163. *Winters v. United States*, 89 S. Ct. 57, 60 (1968) (Douglas, Circuit Justice). The entire quote reads:

[I]t is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

Id. at 59-60.